Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts

By Cesare P.R. Romano

> "There are one-story intellects, two-story intellects, and three-story intellects with skylights. All fact collectors with no aim beyond their facts are one-story men. Two-story men compare reason and generalize, using labors of the fact collectors as well as their own. Three-story men idealize, imagine, and predict. Their best illuminations come from above through the skylight."
>
> Oliver Wendell Holmes Sr. (1809 - 1894)[1]

> "Prediction is very difficult, especially about the future."
>
> Niels Bohr (1885 - 1962)[2]

> "The best way to predict the future is to invent it."
>
> Alan Kay (1940 -)[3]

A. *Introduction*

In 1944, when the Axis defeat was no more a matter of "if" but "when," Manley O. Hudson was asked by the Carnegie Endowment and the Brookings Institution to predict the future of international adjudication. The result of his investigation was published under the title *International Tribunals Past and Future*.[4] As the foreword to *International Tribunals* noted, Hudson's impressive experience and expertise made him "the most competent man available for a study of judicial

---

[1] Attributed to Oliver Wendell Holmes, Sr. He mentions a "one-story intellect" in a poem titled, "The Autocrat of the Breakfast Table."

[2] Attributed to Neil Bohr [but also attributed to Yogi Berra and Mark Twain]. *See* Wikipedia, *Niels Bohr*, http://en.wikipedia.org/wiki/Niels_Bohr.

[3] "The origin of the quote came from an early meeting in 1971 of PARC (*Palo Alto Research Center*) folks and the Xerox planners. In a fit of passion I uttered the quote!" Alan Kay, in an email on Sept. 17, 1998 to Peter W. Lount. *See* Wikipedia, *Alan Kay*, http://en.wikipedia.org/wiki/Alan_Kay.

[4] Manley O. Hudson, International Tribunals Past and Future (1944).

Miller & Bratspies (Eds), Progress in International Law, pp. 433–450.

organization in the post-war world."[5] As a legal adviser of the U.S. delegation to the Versailles peace conference, he championed United States' ratification of the Statute of the Permanent Court of International Justice (PCIJ).[6] He became a judge of that court in 1935, and held the position until the outbreak of the Second World War. His works on the PCIJ,[7] and, after the war, on the International Court of Justice (ICJ), including annual reports in the *American Journal of International Law*,[8] are still must-reads for scholars of international courts.

While it is obvious that the world in which Hudson lived is substantially different from the one in which we are living today, it is also true that the degree of difference depends on the area of international organization one examines. Of all the areas surveyed in his lectures, published under the title *Progress in International Organization*,[9] the one that has changed most radically is probably the international judicial function.

Crystal ball-gazing is an intriguing exercise. Hudson was particularly keen to it. Yet, it is intrinsically perilous work, especially when one's success invites future generations of scholars to reread one's writings. Second-guessing several decades later can be merciless and unfair. With this general caveat, using Hudson's signature "survey-perspective" style, this chapter will attempt to map the most notable changes that have occurred in the international judicial function since the publication of his books *Progress* (1932) and *International Tribunals* (1944), and assess whether the development of the international judicial function

---

[5] *Id.* at v.

[6] Statute of the Permanent Court of International Justice (PICJ), Dec. 13, 1920, 6 L.N.T.S. 390.

[7] *See* Manley O. Hudson, The Permanent Court of International Justice and the Question of American Participation (1925); Manley O. Hudson, America and the World Court (1926); *In re* the World Court: The Judgment of the American Bar as Expressed in Resolutions of National, State and Local Bar Associations, 1921–1934 (Manley O. Hudson ed., 1934); Manley O. Hudson, The World Court 1921–1938 – A Handbook of the Permanent Court of International Justice (1938); World Court Reports: A Collection of the Judgments, Orders, and Opinions of the Permanent Court of International Justice (Manley O. Hudson ed., vols. I-IV 1922–1942); Manley O. Hudson, The Permanent Court of International Justice 1920–1942 (1943).

[8] *See, e.g.*, Manley O. Hudson, *The Second Year of the Permanent Court of International Justice*, 18 Am. J. Int'l L. 1 (1924); Manley O. Hudson, *The Thirty-Seventh Year of the World Court*, 53 Am. J. Int'l L. 319 (1959).

[9] Manley O. Hudson, Progress in International Organization (1932).

has, indeed, taken place along the lines imagined by that illustrious scholar two or three generations ago.

B. *Some Notable Changes in the International Judicial Function*

The list of differences between the contemporary international judicial landscape and the one in Hudson's era is long and tedious. Accordingly, I will limit this chapter to consideration of only the most notable ones. I will then offer some thoughts on the long, and still much ongoing, march from "dispute settlement" to "international justice."

I. *Enormous Growth of Fora*

In Hudson's era, the number of international courts was relatively small. The only standing international judicial bodies were the PCIJ[10] and the Permanent Court of Arbitration,[11] which was, and still is, only an institutionalized form of arbitration rather than a truly permanent court. Besides these two, for sake of completeness, one should mention the short-lived Central American Court of Justice,[12] which existed between 1908 and 1918, and the aborted International Prize Court,[13] the statute of which, adopted in 1907, never entered into force. Other than these, *ad hoc* international arbitral tribunals dominated the scene. Interestingly, during Hudson's time, a number of other international judicial bodies were proposed, and, in some cases, those early ideas germinated several decades later.[14]

---

[10] PICJ, *supra* note 6.

[11] International Convention for the Pacific Settlement of International Disputes (Hague I), July 29, 1899, 32 Stat. 1779.

[12] Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, 3 Marten Nouveau Recueil 105. For a short account of the life of the CACJ, *see* Jean Allain, A Century of International Adjudication 67–92 (2000).

[13] Convention Relative à l'Établissement d'une Cour Internationale des Prises, Deuxième Conférence Internationale de la Paix, 1 Actes et Documents 668 (1907) (Fr.) [Convention on the Establishment of an International Prize Court, Second International Peace Conference, 7 Acts and Documents 668 (1907)].

[14] Besides the International Prize Court, Hudson lists the Inter-American Court of International Justice; the International Criminal Court; the International Claims Tribunals, the International Loans Tribunals, various International Commercial and Administrative Tribunals; and Permanent Conciliation Commissions. Hudson, *supra* note 4.

In spite of his enthusiasm for an increasing role for international adjudicatory bodies, Professor Hudson could hardly have imagined the sheer number and diversity of international judicial bodies existing at the beginning of the 21st century. Depending on what criteria of classification are adopted, one can count about two dozen international courts, and almost seventy bodies carrying out quasi-judicial implementation, control, and dispute settlement functions.[15]

Today, four international judicial bodies have, potentially, worldwide jurisdiction. They are the ICJ,[16] the International Tribunal for the Law of the Sea,[17] the International Criminal Court,[18] and the dispute settlement system of the World Trade Organization.[19] While each of these bodies and mechanisms has its own peculiarities and limitations worthy of investigation, a discussion of these matters is beyond the scope of this chapter. Suffice it to say, the jurisdiction of these bodies is not, *per se*, restricted geographically. Any state in the world can become a party to the treaties that created them and thereby be subject to their jurisdiction.

Yet, it is the regional level, not the global, which has provided the most fertile ground for the germination of international judicial bodies.[20] Most are either organs of regional organizations or organs of global international organizations operating in, or with jurisdiction limited to, a specific region (e.g. the ad hoc criminal tribunals for the former Yugoslavia[21] and Rwanda[22]). Some are thriving more than others, but even if only quantitatively, the development is significant.

---

[15] For a comprehensive list, see Project on International Courts and Tribunals, Synoptic Chart, http://www.pict-pcti.org/publications/synoptic_chart.html. The chart lists under the heading "international judicial bodies" 22 existing bodies, and three more about to be established. Under the heading "Quasi-judicial, implementation control and other dispute settlement bodies" there are listed 64 bodies and procedures, and five more are about to be established.

[16] U.N. Charter, arts. 7.1, 36.3. Statute of the International Court of Justice, art. 36, 26, June 26, 2945, 59 Stat. 1055, 33 U.N.T.S. 993.

[17] Law of the Sea Convention, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982). Part XV, section 2 of the convention is dedicated to the peaceful settlement of disputes. The ITLOS Statute is contained in Annex VI.

[18] Rome Statute of the International Criminal Court (ICC), July 17, 1998, 2187 U.N.T.S. 90.

[19] WTO Agreement. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994). Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex II, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter Rules and Procedures].

[20] *See* Parker, in this volume.

[21] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[22] International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

Hudson also did not foresee the specialization and diversification of regional courts:

> The problem of permanent regional tribunals ... will doubtless continue to command attention.... If some centralization of an international adjudicature is desirable to safeguard the unity of universal international law, it cannot be pursued in neglect of local requirements, and where States in any region wish to do so they must be free to create local tribunals for handling their disputes.... To some extent ... special needs could be met by forming chambers within the [PCIJ] ....[23]

Thus, in Hudson's conception, regional courts were a "problem." If some regional courts had to exist, they were going to be only small-scale and geographically limited, that is to say, bodies that could adjudicate disputes between sovereign states belonging to the same region or regional organization. However, the Central American Court of Justice (CACJ),[24] the only regional court that existed during Hudson's time, should have suggested to him that more were to come. Indeed, the CACJ was not only the first truly permanent international court in history, but was also the first instance of an international court open to individual complaints. Its jurisdiction included disputes between nationals of one of the Central American states and any of the other Central American states.[25]

II. *Rise of Non-State Actors*

This leads to the second difference between Hudson's world and our own. While, in his days, international courts almost exclusively adjudicated disputes between sovereign states, nowadays the number of *fora* whose contentious jurisdiction is restricted to states is only a fraction of those that are open to non-state entities.[26] Regional courts thrive not because they provide localized alternatives to global

---

[23] HUDSON, *supra* note 4 at 252.

[24] CACJ, *supra* note 12.

[25] The CACJ was involved in ten cases during its short existence (1908-1918), of which individuals brought five. None was found admissible, however. ANALES DE LA CORTE DE JUSTICIA CENTROAMERICANA (REGULATIONS OF THE CENTRAL AMERICAN COURT OF JUSTICE) (Nov. 1911), *available at* www.worldcourts.com/cacj/eng/documents/1912.11.06_procedure/option_ii/1912.11.06_procedure.pdf. *See also* ALLAIN, *supra* note 12.

[26] Actually, no international judicial body is open *exclusively* to sovereign States. The EC and certain non-sovereign custom territories like Hong Kong and Macao, are members of the WTO and have standing as such in the dispute settlement system. The ICJ is partially open to entities other than States, for it can receive requests of advisory opinions from some UN organs and some of its specialized agencies. The Seabed Dispute Settlement Chamber of the International Tribunal for the Law of the Sea is open to States Parties, the International Seabed Authority, the Enterprise, State enterprises and natural or juridical persons.

courts, as Hudson imagined, but because they provide services that global courts cannot provide.

One of the fundamental features setting contemporary regional courts apart from their global peers is that they can be accessed for all kinds of claims (contentious, advisory, appellate, administrative, preliminary and criminal) by a large and diversified number of non-state entities.[27] Greater political, economic and social integration is attained more easily at the regional than the global level. Greater transfers of sovereignty can take place and states are willing to create judicial bodies where their compliance with international agreements can be challenged not only by other states, but also by their own citizens. For example, a French company cannot challenge protectionist practices of the German government before the WTO dispute settlement bodies (nor, for that matter, those practices adopted by any other country). Yet, it can do so before the European Court of Justice[28] if those practices are cast as a violation of the laws of the European Communities. Similarly, a Senegalese citizen cannot challenge his/her order of expulsion from Spain in violation of the principle of *non-refoulement* before the International Court of Justice. However, that person can complain to the European Court of Human Rights.[29] In addition, it is significant that, in all *fora* where non-state entities have standing, non-state actor cases dominate the docket. Although states can bring cases against other states before the European Court of Human Rights, the Inter-American Court of Human Rights,[30] or the European Court of Justice, for example, instances of such inter-state litigation are extremely rare.

III. *Advent of International Criminal Courts and Tribunals*

Regional economic/political/social integration is not the only force fueling the proliferation of international judicial bodies. Rather, the need to ensure prosecution of war crimes, crimes against humanity and the crime of genocide has also generated, in recent years, a considerable number of international and hybrid judicial bodies.[31] The list of criminal courts and tribunals established interna-

---

[27] *See* Schurtman, in this volume; Miller, in this volume.

[28] Treaty on European Union, Feb. 7, 1992, O.J. (C 191) 1 (1992), amended by Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, O.J. (C80) 1 (2001).

[29] European Convention on Human Rights and Fundamental Freedoms, art. 33, Nov. 4, 1950, 213 U.N.T.S. 222, amended by Protocols nos. 3, 5, 8.

[30] Statute of the IACHR, art. 61, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98, Annual Report of the Inter-American Court on Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992).

[31] *See* Sadat in this volume.

tionally since the end of the Cold War is long and growing. It includes the "twin tribunals" (the International Criminal Tribunals for the former Yugoslavia[32] and for Rwanda[33]), the International Criminal Court,[34] the Special Court for Sierra Leone,[35] and internationalized panels in East Timor,[36] Kosovo and the Extraordinary chambers in the courts of Cambodia.[37] On the launch pad, there is also a criminal body to prosecute and try the assassins of former Lebanese Prime Minister Rafik Hariri.[38]

When Hudson gave his *Progress* lectures, international criminal law was still an abstract discipline, taking its first tentative steps. Attempts to prosecute the German Kaiser in the wake of World War I had led nowhere.[39] A few of the war crimes committed during that conflict were prosecuted domestically. There was no follow-up on a proposal by the Committee of Jurists, which had been entrusted with the preparation of the Statute of the PCIJ, to establish a High Court of International Justice to try "crimes constituting a breach of international public order or against the universal laws of nations."[40] Likewise, a convention to establish an International Criminal Court to prosecute and try persons accused of acts of terrorism was adopted in 1937 but never entered into force.[41]

Although *International Tribunals* was published in 1944, clearly on the assumption of the inevitable victory of the allied powers, it surprisingly does not contain

---

[32] S.C. Res. 827, *supra* note 21.

[33] S.C. Res. 955, *supra* note 22.

[34] ICC, *supra* note 18.

[35] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, app. II, Jan. 16, 2002, http://www.sc-sl.org/scsl-agreement.html.

[36] Resolution on the situation in East Timor, S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

[37] Resolution on the situation relating Kosovo, S.C. Res. 1244, UN Doc. S/RES/1244 (June 10, 1999). Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of the Democratic Kampuchea (Khmer Rouge Trials), as adopted by the UN General Assembly, U.N. Doc. A/57/806 (May 22, 2003).

[38] S.C. Res. 1757 (2007).

[39] *See* Jackson Nyamuya Maogoto, State Sovereignty and International Criminal Law: Versailles to Rome (2003) (on the history of international criminal law during the twentieth century).

[40] James Brown Scott, The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists (1920).

[41] Convention for the Creation of an International Criminal Court, Nov. 16, 1937, League of Nations O.J. Spec. Supp. 156 (1938); League of Nations Doc. C.547(I).M.384(I).1937.V, *reprinted in* 7 International Legislation (1937-1938) 878 (Manley O. Hudson, ed., 1941).

any reference to the possibility of trying Nazi and Japanese military leaders for war crimes. Hudson ends the section on the proposed International Criminal Court by concluding:

> Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of States or of individuals.[42]

Within two years, international military tribunals were convened in Nuremberg[43] and Tokyo,[44] setting a milestone in the history of international criminal law. On this point, like others stances Hudson took in *Progress* and *International Tribunals*, he was dramatically proven wrong. However, considering that the rigors of the Cold War made it impossible to repeat the exercise for almost a half-century, Hudson's pessimism was probably not totally off the mark.

IV. *Compulsory Jurisdiction is Becoming the Rule Rather than the Exception*

International courts can exercise jurisdiction only if states have accepted it. This is a basic tenet of the international legal system and a corollary of the fact that states are sovereign entities.[45] This was true in Hudson's time and it continues to be true today. The "problem of consent" is, in the layperson's eyes, what condemns the international system to be but a pale imitation of a true judiciary: national courts. Yet, since Hudson's days, the consent issue has fundamentally morphed.[46] Before and immediately after the Second World War, the international judicial scene was largely populated, on the one hand, by arbitral panels (*ad hoc* or facilitated by the PCA), and on the other hand, by the PCIJ/ICJ. Then, as well as now, states are subject to the jurisdiction of those bodies and procedures if consent has been given by way of an *ad hoc* agreement after the emergence of the dispute. The only way consent can be given *a priori* of the emergence of any dispute is either by way of a compromissory clause contained in a treaty, or, in the case of the PCIJ/ICJ, through the so-called optional declaration. Consent, in any case, must always be explicit and can never be implied.

---

[42] Hudson, *supra* note 4, at 186.

[43] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[44] Special Proclamation of the Supreme Commander for the Allied Powers at Tokyo, Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

[45] "[N]o State can, without its consent, be compelled to submit its disputes … to arbitration, or any other kind of pacific settlement." Advisory Opinion No. 5, *Status of Eastern Carelia*, 1923 P.I.C.J. (ser. B) No. 5 at 27 (Jul. 23).

[46] *See* Cesare Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. Int'l. L. & Pol. 101 (2007).

However, in the contemporary world, in the majority of cases, consent to an international judicial body's jurisdiction is implicit in a state's membership in an organization or legal system of which the given judicial body is an organ. Currently, the only bodies where consent must be given explicitly (either *ante* or *post* the emergence of any given dispute) are the ICJ, the International Tribunal for the Law of the Sea, and the Inter-American Court of Human Rights.[47] Interestingly, these are bodies created before the end of the Cold War. All international courts created after the end of the Cold War have compulsory jurisdiction. Membership in the World Trade Organization carries with it acceptance of the dispute settlement system of that organization.[48] Ratification of the Rome Statute of the International Criminal Court implies acceptance of the ICC jurisdiction.[49] Resolutions of the Security Council are binding on UN members, and when the Council decides to establish an *ad hoc* international criminal tribunal, all UN members are bound to comply with decisions and orders of that tribunal.[50] To become Members of the Council of Europe, ratification of the 1950 European Convention on Human Rights and it Protocols (establishing the European Court of Human Rights), is required.[51] The acceptance of the jurisdiction of the European Court of Justice is implicit in the ratification of the EC Treaty.[52]

---

[47] Statute of the International Court of Justice, *supra* note 16, art. 36; Organization of American States, American Convention on Human Rights, art. 62, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Law of the Sea Convention, *supra* note 17, arts. 286–96 (Compulsory Procedures) and 297–99 (Limitations and Exceptions).

[48] The Understanding on Rules and Procedures Governing the Settlement of Disputes is an Annex of the WTO Agreement. Rules and Procedures, *supra* note 19.

[49] "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court. ..." ICC, *supra* note 18, art. 12.1.

[50] The Prosecutor v. Tadic, Case No. IT-94-1-T, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, July 15, 1999, paras 28–48. (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995).

[51] "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council." Statute of the Council of Europe, May 5, 1949, art. 3, 87 U.N.T.S. 103, Europ. T.S. No. 1. "Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to [the European Convention] under the same conditions." European Convention, art. 65. Currently, Belarus is the only major European State that has not yet ratified the European Convention and is not member of the Council of Europe. The Parliamentary Assembly of the Council of Europe has determined that Kazakhstan could apply for full membership, because it is partially located in Europe, but that they would not be granted any status whatsoever at the Council unless democratic and human rights record improve.

[52] "The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed." Treaty of Nice, *supra* note 28, art. 220.

Thus, it is clear that the there is a trend towards treating acceptance of international courts' jurisdiction as part and parcel of participation in the legal systems in which those judicial bodies are embedded. It is also clear that this is a trend that is stronger at the regional level and within specialized regimes. Were the ICJ jurisdiction limited only to the interpretation of the U.N. Charter and U.N. legal acts, then general compulsory jurisdiction of the World Court would be conceivable. But, as long as the ICJ's jurisdiction remains as extensive as it is,[53] it is clear that sovereign states wish to determine for themselves when, and under which circumstances, they may submit their disputes to the jurisdiction of the World Court.

In 1932, Hudson wrote: "Today, one may fairly confidently look forward to a time when most of the nations of the world will have conferred on the Court [the PCIJ] a large degree of compulsory jurisdiction."[54] Although this is not yet the case, today compulsory jurisdiction has become the rule rather than the exception.

V. *Birth of an International Legal Profession*

In *International Tribunals* Hudson wrote,

> The selection of the members of international tribunals frequently presents problems of great difficulty, and in some instances the structure of the tribunal is made to depend upon the solution given to these problems. No group of men exists which can be said to form a profession of international judges, and but few individuals are so outstanding as to be repeatedly called upon to serve as members of different tribunals. The number of men actually serving in such positions at any one time is quite limited, and their selection is usually determined by a variety of considerations, some of them more or less fortuitous. The role is not one offering a career for which men are, or can be, specially trained.[55]

Today, the sheer number of international judicial and quasi-judicial bodies makes it possible to argue that an "international judicial operator" profession has emerged. There are more than 240 individuals worldwide who sit on the bench of an international judicial body.[56] Several of these people have served on two or

---

[53] Under art. 36 of the statute, it "encompasses any legal dispute concerning a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) and the nature or extent of the reparation to be made for the breach of an international obligation." Statute of the International Court of Justice, *supra* note 16.

[54] HUDSON, *supra* note 9, at 59.

[55] HUDSON, *supra* note 4, at 32.

[56] *See* TERRIS, ROMANO, SWIGART, THE INTERNATIONAL JUDGE (2007).

more international judicial bodies in their careers.[57] If the focus is also enlarged to people staffing the registries, attorneys and counsels frequently appearing before these bodies, and, in the case of criminal tribunals, attorneys working as prosecutors, it is clear that, to paraphrase Hudson, today the role *does* offer a career for which people should be specially trained.

These men and (regrettably few) women are an absolute novelty in the world of international relations. They do not further interests of any one state, as diplomats do, nor those of an international organization, as do top officials of international organizations, like the Secretary General of the U.N. or the President of the World Bank.[58] Instead, their mission sits somewhat astride the maintenance of peace by way of dispute settlement, and that of enforcement of international law; astride the functions of a diplomat and those of a judge, as understood in the domestic context. International judges face extreme and often exponential versions of the challenges faced by their peers on the courts of their home countries. The decisions they take often impact the lives of millions, alter international equilibria, and shape the content of international law, and do so under the close scrutiny of the international community, media, and civil society. They are called upon to develop new jurisprudence for an increasingly interconnected but still diverse world. They must maintain the strictest standards of ethical conduct, including independence and impartiality, while operating in a highly politicized domain. And their work is performed in an institution that brings together individuals whose legal training, professional background, native language, and cultural assumptions may be markedly different.

---

[57] For instance, a judge currently serving at the ICJ, Thomas Buergenthal was formerly a judge and President of the IACHR (1979–1991) and then judge, Vice-President, and President of the Administrative Tribunal of the Inter-American Development Bank (1989–1994). At the WTO AB, Georges Abi Saab has been member of the ICTY/ICTR Appeals Chamber and judge ad hoc at the ICJ. At the ICTY, Mohammed Shahabudeen, member of the ICTY/ICTR Appeals Chamber, has been judge at the ICJ (1988–1997) while Christine Van Den Wyngaert, has been ad hoc judge at the ICJ. At the ICC a larger number of judges has previous experience: Elizabeth Odio Benito served at the ICTY (1993–1998), so did Claude Jorda (1994–2003, President between 1999–2003), while Navanethem Pillay was President of the ICTR (1995–2003). Finally, the ECJ has in its ranks four former ECHR judges: Jerzy Makarczyk, Pranas Kuris, Uno Lohmus and Egils Levits, from Poland, Lithuania, Estonia and Latvia, respectively.

[58] *See* Rules of Court, European Court of Human Rights, r.3, *reprinted in* Council of Europe, European Convention on Human Rights 151 (1987), "'I swear' – or 'I solemnly declare' – 'that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations.'" ICJ (Rules, art. 4), "I solemnly declare that I will perform my duties and exercise my powers as judge honorably, faithfully, impartially and conscientiously." For the rules of procedure of international courts, *see* Dispute Settlement in Public International Law (Karin Oellers-Frahm & Andreas Zimmermann eds., 2d ed. 2001).

Because it is only recently that their ranks have swollen to the point at which it is possible to study them as a group, they remain a largely unknown and obscure lot that warrants research and study. Fundamental questions to be answered are: Who are these people? Where do they come from? How are they trained? How (if at all) do they interact with each other across courts? To whom or to what is their allegiance owed? How do they conceive their mission? What do they think is their proper place in the world of international relations, and society at large? Answering these questions is, of course, beyond the scope of this chapter, but, as Professor Philippe Sands wrote,

> If we are happy to have international courts fulfill political functions that tie them closely to international organizations, then perhaps we should not get too exercised about [them]. If, however, we see international courts as exercising judicial functions analogous to those we expect of our national courts, then it is right to focus our attention on who the judges are and how they attain their offices.[59]

Understanding international judges is essential if we are ever going to understand the forces driving the expansion and transformation of the world of international courts and their direction.[60]

C. *From Dispute Settlement to International Justice*

The cumulative result of all these developments is, ultimately, the transformation of the nature and purpose of international courts. Traditionally, international courts have been viewed as part of the wider discipline of international dispute settlement. The canonical approach to international dispute settlement begins with recalling the obligation states have, under the U.N. Charter, to settle international disputes peacefully and by means of their own choice.[61] Then, traditional exposés analyze, one by one, the whole gamut of typical dispute settlement mechanisms available, starting first with the so-called "diplomatic means," such as negotiation, enquiry, mediation, or conciliation. Eventually they end with those whose outcome is legally binding (known also as adjudicative means), like arbitration and settlement by way of standing international judicial bodies.[62]

---

[59] Philippe Sands, *Global Governance and the International Judiciary: Choosing our Judges*, 56 CONTEMP. LEGAL PROBS. 482, 502 (2003).

[60] For a first attempt to study international judges in all international courts, *see* TERRIS ET AL., *supra* note 56.

[61] U.N. Charter, *supra* note 16, arts. 2.3 & 33; UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (1992).

[62] *See, e.g.*, JOHN G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (4th ed. 2005); JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW (2000).

Yet, this classical approach to international dispute settlement, which, for historical reasons, is also Hudson's approach, is concerned mostly with disputes between sovereign states. Adjudication is ultimately regarded as a sort of "continuation of diplomacy by judicial means," to paraphrase the famous quote from Carl von Clausewitz in his seminal treatise *On War*.[63] Yet, classifying the work of the international judiciary with the means and ends associated with consultation, mediation, conciliation, and *ad hoc* arbitration is no longer correct and has become potentially misleading. International judicial bodies are no longer one of the many arrows in the quiver of foreign affairs ministries to resolve legal disputes with their peers. They no longer serve as legal arenas within which advisers representing sovereign states "peacefully fight out" disputes, which, otherwise, would be fought out for real on the battlefield.

In the contemporary world, where the majority of courts decide mostly cases involving non-state entities, thus acting outside the state-centered paradigm, the system ought to be about more than just the settlement of disputes. While it is true that, in the overwhelming majority of cases, international courts settle legal disputes on a point of law or fact between two or more parties, contemporary international courts do much more than that.

First, international judicial bodies not only settle disputes but also expand international law by clarifying its content. They transform abstract norms into cogent and binding reality, and, in doing so, they necessarily also contribute to the solidification and development of international law.[64] In international law, pronouncements of international judicial bodies do matter, albeit not in the technical sense of *stare decisis* as understood in the Anglo-American legal tradition. Even in the case of the International Court of Justice, which is mandated by its own statute to relegate judicial decisions, even its own, to a subsidiary role,[65] precedent and prior case law are often referenced.[66] International courts strive to maintain their own internal coherence. Whenever they feel they need to depart from precedent, they invariably try to explain why the cases are distinguishable and why a change of course is warranted on legal grounds. This effort differs little from that of national supreme or constitutional courts. In addition, although most international courts are not structurally related to each other, they tend to

---

[63] Carl von Clausewitz, On War (Michael Howard & Peter Paret trans., Princeton U. Press 1989). The original quote is "war is a continuation of politics by other means."

[64] *See*, Terris et al., *supra* note 56, ch. 4.

[65] ICJ Statute, *supra* note 16, arts. 59 & 38.1.d.

[66] *See* Alain Pellet, *Article 38, in* The Statute of the International Court of Justice 783-90 (Andreas Zimmermann ed., 2006).

take notice of and not to depart unnecessarily from pronouncements of other international courts.[67] International judges tend to be well aware of the fact that, by rendering judgments, they are *de facto*, if not *de jure*, contributing to the development of an overarching international legal order.[68] In so doing, international judges affect a community that is actually much larger than the parties to the given case.

This was evident even in the formative era of international judicial institutions, at least to insightful people like Hudson, who commented

> It does not require any bold leap of imagination to foresee what this will mean to the world half-century hence. If the present use of the Court [the PCIJ] continues, we shall then have at hand a large volume of decisions which will constitute a veritable quarry of international law.[69]

More than half a century later, we do indeed have available a "quarry of international law," an international "common judicial heritage," and one probably far greater than even Hudson dared imagine. It is beyond doubt that this considerable jurisprudential production has advanced international law. Yet, the process has surely been far from unidirectional and consistent, and this is something he would likely not have envisioned.

Second, while the settlement of disputes is the "ur-mission" of international adjudicative bodies, today their goal cannot be summarized in such simple terms. Contemporary international courts exercise two kinds of jurisdiction that were either absent or only just emerging during Hudson's era, and, which, fundamentally depart from the limited aim of settling a dispute between two parties: they are criminal and advisory jurisdiction.

We already addressed the multiplication of international criminal bodies. Let us add that, admittedly, even criminal cases can be seen as disputes between the prosecutor and the indictee on a series of facts and interpretation of those facts in the light of the law. Yet, it is obvious that this is not the primary *raison d'être* of international criminal courts and tribunals. Rather, they are created to sanction international crimes. They administer international criminal justice, an "international public good" that cannot be produced in the necessary quantity or quality by domestic courts.

---

[67] Nathan Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals*, 15 LEIDEN J. INT'L L. 483-526 (2002).

[68] *See* TERRIS ET AL., *supra* note 56, ch. 4.

[69] HUDSON, *supra* note 9, at 81.

The first international judicial body to be given the power to render advisory opinions was the PCIJ.[70] This was a fundamental shift from the classical dispute-centered international judiciary paradigm because it enabled the court to render a formal opinion on a point of law outside adversarial proceedings. Hudson was well aware of the importance of this development and its impact on the ultimate nature of the system. In *Progress* he wrote:

> I think that many people had not expected, and certainly some people in this country have not understood, the significance of the [PCIJ] advisory opinions [...]. During the first ten years, the Court has given 19 advisory opinions, and in one instance it has declined to give an opinion. When these opinions are compared with the judgments and orders of the Court, I think there can be little doubt that they have a greater importance. The procedure followed by the Court in giving them has been so largely assimilated to that in contested cases that these authoritative declarations of the law have as much juridical weight as the judgments themselves, and in situations to which they relate are more vital to our current international life than those in which States have been willing to agree to adjudicate differences....[71]

Despite initial hesitations on the part of states in the PCIJ era, the ICJ retained this power when its blueprint was laid down in the U.N. Charter.[72] Currently, almost all contemporary international judicial bodies have the power to render advisory opinions. There are two notable exceptions, which further prove the point that the addition of advisory functions to the classical dispute settlement mechanism has fundamentally transformed the nature of the international judiciary. The first is international criminal tribunals, whose nature, structure, and mission are incompatible with the speculation in abstract about the existence and scope of norms of international criminal law. The second is the World Trade Organization dispute settlement system, which, of all, is the international adjudicative process most akin to arbitration (at least at the panels level).

The rationale for advisory jurisdiction is, essentially, to provide a given international organization a means to address fundamental issues for the life of the organization (*e.g.* existence and powers of the organization or its organs, or questions of separations of power between the various organizations' main organs), and/or to promote respect for the law within the given legal regime (U.N. Charter, regional

---

[70] While the PICJ Statute did not provide for advisory opinions until its inclusion in the 1929 revised statute, which came into force in 1936, there was nonetheless a practice of requesting opinions well before the revision, premised on the Rule of Court. *See* Stephen Schwebel, *Was the Capacity to Request an Advisory Opinion Wider in the Permanent International Court of Justice than it is in the International Court of Justice?*, 62 BRIT. Y.B. INT'L L. 77, 78–81 (1991).

[71] HUDSON, *supra* note 9, at 66–67.

[72] U.N. Charter, *supra* note 16, art. 96; ICJ Statute, *supra* note 16, art. 65–68.

human rights systems).[73] Notwithstanding this "constitutional" role, advisory opinions have also been used either as a roundabout way to settle disputes[74] when access to the court is otherwise restricted, or to identify the law on policy issues that are of interest to the international community at large.[75] This, at least, is the history of the use of the advisory jurisdiction of the World Court. As Hudson acutely remarked: "The Court's [the PCIJ/ICJ] place in the international organization of our time might well be a subordinate one if it did not possess this competence to give advisory opinions."[76]

Advisory jurisdiction has allowed the ICJ to make foray into terrain generally considered to be the preserve of politics. It is hard to picture advisory opinions like those in the *Legality of the Threat or Use of Nuclear Weapons*,[77] the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[78] and, partly, those in *South West Africa*,[79] as "UN constitutional issues." They referred, instead, to largely political disputes (between states with nuclear weapons and states without; between Palestinians and the Arabs and Israel; between African states and much of the world, and the apartheid regime in South Africa). When rendering these opinions, the ICJ did more than add its voice to those of the disputing parties. It put itself at the service of humanity and international law, thus transcending its dispute settlement functions.[80]

---

[73] Christian Dominicé, *Request of Advisory Opinions in Contentious Cases?, in* INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT 91 (Laurence Boisson de Chazournes et al., eds., 2002).

[74] *Id.*

[75] Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of the Common Interest of Mankind, in* INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT, *supra* note 73, at 105.

[76] HUDSON, *supra* note 9, at 69.

[77] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July).

[78] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. 131, (9 July).

[79] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (21 June).

[80] *See* Julie Calidonio Schmid, *Advisory Opinions On Human Rights: Moving Beyond A Pyrrhic Victory*, 16 DUKE J. COMP. & INT'L L. 415 (2006).

D. *Standing on the Shoulders of Giants ...*

In *Progress in International Organization* Hudson noted:

> A century hence people may be as grateful to us for the League of Nations and the Permanent Court of International Justice as we are now grateful to the generation of Washington and Adams and Jefferson and Madison for the Congress and the Supreme Court of the United States.[81]

Three quarters of a century hence, this prediction still seems rather improbable if not hyperbolic. At the risk of being second-guessed in my turn, I dare to say that such a day will probably never come. To some, the "constitutionalization" of the international system, the dawn of the perfect world federation or government equipped with three separate powers (judiciary/executive/legislative), might be a desirable goal.[82] Hudson, at least, seemed to share this aspiration, although he was more open-eyed about the possibility of its actual realization:

> It would be a great advance over what we have known in the past if the whole community of States, the community to which international law applies, were organized in such a way that a court or a system of courts is created by the international community, and vested with power to adjudicate certain or all kinds of disputes regardless of the consent of all parties, and endowed with such a continuing general support that its authority would not lightly drawn into question.... Yet such a development would involve a centralization which has not been attempted in the past.[83]

Today, Hudson's view seems closer to realization in Europe than elsewhere, and certainly more so there than on global terms. However, for the time being, the international system will remain fragmented and will reflect the wide and uneven international distribution of power.[84] For this reason the long march towards the building of an international judiciary is necessarily random and unplanned. Still, one cannot look at the dozens of international judicial and quasi-judicial bodies currently in existence and conclude that they are just an elaborated and institutionalized alternative to direct negotiations between the parties, or even to outright violence, as was the case in Hudson's day. Rather, this is, hopefully, the beginning of a process leading to the construction of a coherent international order based on justice; of an order where all participants (sovereign states, individuals, multinational corporations) can be held accountable for their actions or seek redress through an impartial, independent, objective, and law-based judicial institution. Nothing more, but also nothing less.

---

[81] HUDSON, *supra* note 9, at 120.

[82] *But see* Walter, in this volume.

[83] HUDSON, *supra* note 4, at 235.

[84] José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405 (2003).